IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

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JUDGMENT

Rajaram & Brothers.
vs.
Mohanlal.

S.B.CIVIL SECOND APPEAL NO.82/1989 UNDER SECTION 100 CPC AGAINST THE JUDGMENT AND DECREE DATED 13.3.1989 PASSED BY SHRI K.K. BHARGAVA, ADDITIONAL DISTRICT JUDGE, CHITTORGARH IN CIVIL APPEAL NO.83/1985.

DATE OF JUDGMENT ::: 15.3.2007

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr.G Vaishnav, for the appellant.
Mr.BN Kalla, for the respondent.

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BY THE COURT:

Heard learned counsel for the parties.

The appellant/defendant is aggrieved against the judgment and decree dated 13.3.1989 by which the first

appellate court reversed the judgment and decree of the trial court dated 18.4.1981 dismissing the suit of the plaintiff and granted decree in favour of the plaintiff for damages of Rs.7,000/- with interest at the rate of 9% p.a.

Brief facts of the case are that the plaintiff alleged that the defendant no.1 through defendant no.2 broker purchased 1000 quintals of maize from the plaintiff at the rate of Rs.170/- per quintal. Out of 1000 quintals, the first lot of 100 quintals was sent to the defendant no.1 which was received by the defendant no.1 and the defendant no.1 paid Rs.1,70,000/- as consideration of the said goods. It is submitted that when the plaintiff asked the defendant no.1 to take the delivery of 900 quintals of maize, the defendant no.1 denied the contract. The plaintiff gave notice to the defendant no.1 in April, 1974 which was replied by the defendant no.1 by telegram dated 11.4.1974 wherein the defendant no.1 again denied the contract to purchase 900 quintals of maize. The plaintiff thereafter gave notice to the defendants on 8.7.1974 which was received by the defendant no.1 on 9.7.1974 and by the defendant no.2 on 10.7.1974. In reply to said notice, again the defendant no.1 denied the contract. The plaintiff claimed that since the defendant no.1 did not take delivery of the goods,

therefore, the plaintiff sold the goods in open market and in that transaction, the plaintiff suffered loss of Rs.7,000/- as difference between the rate which was on the date of contract and the date when the goods were sold.

The defendant no.1 in his written statement denied the contract of purchase of 1000 quintals of maize, however, he admitted that he gave order to purchase 100 quintals of maize only for which he has already paid the amount.

The trial court dismissed the suit of the plaintiff after holding that the plaintiff failed to prove the contract for sale of 1000 quintals of maize and further failed to plead and prove market rate on the date of breach of contract.

The plaintiff challenged the trial court's judgment and decree dated 18.4.1981 by preferring appeal. The plaintiff's appeal was allowed by the first appellate court vide judgment and decree dated 13.3.1989. The first appellate court held that the plaintiff though has not pleaded and claimed damages which he could have claimed on the basis of market rate of maize on the date of breach of contract by the defendant i.e. market rate on 10.4.1974. The first appellate court also observed that if the defendant would have sold the goods on 10.4.1974, he might have suffered loss of Rs.12,700/- but he claimed Rs.7,000/-

only because he could not sell the goods on 10.4.1974 because there was no buyer at that time even who could have bought the goods at the rate of Rs.156/- per quintal.

The defendant no.1/appellant being aggrieved against the judgment and decree of the first appellate court has preferred this appeal.

While admitting the second appeal on 21.8.1989, this Court framed following substantial question of law :-

> "Whether in the absence of pleadings and proof about the prevalent market price of the goods on the date of breach of the contract for purchase of 900 bags of maize, the plaintiff is entitled to get compensation ?"

Learned counsel for the appellant vehemnetly submitted that it is clear from the facts mentioned in the plain itself that the plaintiff has not pleaded any fact about the market price as on the date of the alleged contract. However, it is also contended that in fact the defendant no.1 never agreed to purchase 1000 quintals of maize. The defendant no.1 only agreed to purchase 100 quintals for which he has already made payment. It is also submitted that the plaintiff in his entire plaint has not disclosed complete facts how he

suffered loss. It is also submitted that till the goods are not delivered to the defendant or are not sent to the defendant, the defendant cannot become owner of the goods, therefore, the defendant is not liable either for loss or for damages.

Learned counsel for the respondent vehemently submitted that the first appellate court categorically held that the defendant entered into contract to purchase 1000 quintals of maize. On the date of contract, the market rate of maize was Rs.170/- per quintal and this fact is admitted as the defendant admitted that he himself purchased maize from the plaintiff at the rate of Rs.170/- may it be 100 quintals. So far as contract for rest of 900 quintals is concerned, that is part of same transaction. It is also submitted that it has come on record that the market rate as on 10.4.1974 was Rs.156/- per quintal only. The plaintiff clearly proved the difference of amount in contract price and the price which the plaintiff received on sale of goods meant for defendant no.1. In view of the above, it is not a case where the parties were not aware of the market rate claimed by plaintiff and about sale price.

I considered the submissions of learned counsel for the parties and perused the record also.

So far as the contention of learned counsel for the appellant that there is no specific pleading about the market rate on the date when the defendant denied the contract or breached the contract and at the same time, the plaintiff is not claiming the damages on the basis of price which as on 10.4.1974, the defendant's case was that the price never fell down after 4.4.1974 and, therefore, the plaintiff has not suffered any loss. The plaintiff's case is that he sold the goods in July, 1974 because in the month of April, 1974, there was no buyer to purchase the goods. For this, the plaintiff produced his account books. The defendant himself cross examined the plaintiff on his books of account and he got the evidence on record about the market price of goods during this period. It is true that the entire account books itself has not been exhibited or tendered in evidence by the plaintiff but the defendant in cross examination asked the question about the price which the plaintiff received against the sale of the same commodity during this period. The witness who was having his account books with him when was asked to give statement by refreshing his memory from books of account, then that evidence cannot be discarded merely because of the reason that that evidence is oral evidence. Such evidence is in fact coming out from the documentary evidence which were

allowed to be looked into by the court on the request of the defendant. Therefore, the defendant cannot say that the evidence which he invited on record cannot be looked into for the purpose of finding out the price of commodity at various times i.e. between the date of contract and till the goods were sold. It has come on record that if the plaintiff could have sold the goods on any earlier occasion, then damages would have been much more and which has been assessed by the first appellate court as Rs.12,700/- whereas the plaintiff has claimed only Rs.7,000/- as damages. In view of the above, even if there was no specific pleading about the market rate of price on the date of breach of contract, even then the plaintiff not only proved that what was the market rate of goods on the date of breach of contract but in the present case, claimed lesser price than the market price of the goods. Therefore, the first appellate court rightly decreed the suit of the plaintiff after reversing the finding of the trial court. Therefore, substantial question of law, in the facts of the case, is decided against the appellant.

Learned counsel for the appellant also submitted that the first appellate court awarded interest over the decretal amount of Rs.7,000/- despite the fact that there was no counter claim of the plaintiff for award of interest.

The above argument has been advanced on assumption that the plaintiff should have filed any counter claim in a case where the plaintiff's suit was dismissed and the plaintiff has preferred appeal to challenge the judgment and decree of the trial court. The argument advanced is absolutely misconceived. In commercial transactions, if the court below has awarded interest over the above amount, I do not find any reason to interfere in such interest which has been awarded at the rate of 9% p.a. only.

Consequently, this appeal is hereby dismissed with no order as to costs.

(PRAKASH TATIA), J.

S.Phophaliya